IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

APPEAL NO.825 OF 1988

The State of Maharashtra]..Appellant

Vs.

1. Michael Tony Nigam]
aged about 23 yrs.]
Occ: service, residing]
at Kadam Chawl,]
Shantinagar, Shinde]
Chattri, Pune-40]
]

2. Chensing Bansorsing]
Gogadi, Age about 20]
yrs. Occ: Service,]
residing at Race Coruse]
Servants' Quarters]
Pune.]
]

3. Kansing Dalpatsing]
Bhati, Age about 20 yrs]
Occ:Service residing at]
Race Course Servants']
Quarters, Pune.]
]

4. Devram Adhuram Nai]
Age about 20 yrs. Occ:]
service, residing at]
Race Course Servants']
Quarters, Pune.]
]

5. Shankarsing Dhansing]
Bhati, Age about 20 yrs]
Occ:Nil, residing at]
Race Course Servants']
Quarters, Room No.36,]
Pune.]
]

6. Amarsing Kalyansing]
Chouhan, age about]
22 yrs. Occ: Service,]
residing at Race Course]
Servants' Quarters]
Room No.1, Pune.]
]

7. Mulsing Sardarsing Bhati, age about 29 yrs Occ:service, residing at Race Course Servants Quarters, Pune. ..Respondents (Ori.Accused Nos. 1 to 7]

...

Mrs.A.S.Pai A.P.P. for the State
Mr.J.B.Kocheta Advocate for Respondents Nos.1 to 4, 6 and 7
As per Court's order dated 16.4.1991 appeal is dismissed against Respondent No.5.

...

CORAM: D.G.DESHPANDE AND SMT.V.K.TAHILRAMANI,JJ.

DATE OF RESERVING THE JUDGMENT : MARCH 22,2006
DATE OF PRONOUCNING THE JUDGMENT : MARCH, 31, 2006

JUDGEMENT [PER SMT.V.K.TAHILRAMANI,J]:

1. Through this appeal, the appellant State of Maharashtra has challenged the judgment and order dated 17th June, 1988 passed by the learned Additional Sessions Judge, Pune in Sessions Case No. 89 of 1988. By the said judgment and order, the learned Judge acquitted the Respondents i.e. original accused Nos.1 to 7 of the offences under Sections 366, 376 (2)(g) and 302 read with Section 34 of IPC. As per the office noting, it is seen that the appeal is dismissed against Respondent No.5 vide order dated 16.4.1991 and hence, the

appeal is being heard only in respect of Respondent Nos.1 to 4, 6 and 7.

2. The prosecution case briefly stated is as under:

. On 14th November, 1987 at 7.00 p.m. Shobha Ratansing Rajput aged about 22 years was passing from Khan road. At that time, Respondent No.1-Michael Tony Nigam-original accused no.1 came on Scooter and under threat at the point of knife, she was driven on the scooter to a room in race course chawl. There she was raped by ten persons. Thereafter, those ten persons poured kerosene on her person and set her on fire as they were afraid she would tell the police. She sustained 92% burn injuries. In that condition, she walked to Khan Road Police Chowky which was at a short distance. There, she narrated the incident to P.W.14 Police Constable D.N.Sasane. Police constable Sasane immediately covered her with blanket and he informed the incident to police control room. P.W.15 Police Head Constable K.R.Sathe was on night duty at about 00.30 hours on 15th November, 1987, when he was informed that he should immediately report at Khan Road Police Chowky in connection

with the arrival at the police chowky of a lady who had sustained burn injuries. Police Head Constable Sathe immediately went to the Chowky and saw P.W.14 Police Constable Sasane was there. He also found one lady wrapped in a sheet at the Police Chowky. He made enquiry with the victim lady and he learnt from her that at about 7.00 P.M. on 14.11.1987 when she was passing by Khan Road, one person came on Scooter, threatened her at the point of knife, asked her to sit on pillion seat of the scooter and drove her to the room of one Shankar at race-course chawl where ten persons raped her. The lady also informed him that thereafter kerosene was poured on her person and she was set on fire by those persons. The victim lady was taken to Sasoon hospital in a police van where she came to be admitted. She was first attended by P.W.7 Dr. Rajiv Adhav. Dr.Adhav found that Shobha (victim) had sustained 92% burn injuries. However, she was conscious. The lady gave the history which was written in the case papers. In the meantime, P.W.15 Sathe sent message for the Special Judicial Magistrate. Special Judicial Magistrate P.W.9 Rajaram Ratawade came to the hospital and after making enquiries with the Doctor, the victim lady was found in a position to give her dying

declaration. The said dying declaration was recorded at about 2.50 a.m. In the meanwhile, P.W.17 P.S.I. Jadhav recorded the complaint of police constable Sasane and thus, offence came to be registered. Respondent No.1/ accused no.1 came to be traced and he was taken to Sasoon hospital at about 4.00 p.m. on 15.11.1987. At that time, the victim/lady was conscious. The Doctor certified that she was in a position to speak. Thereafter the victim lady identified accused No.1-Michael as the person who had threatened her at the point of knife and taken her on his scooter to a room at race-course where she was gang-raped and thereafter as the accused were afraid that she would tell the police, she was set on fire. Her statement to that effect was recorded. Thus, the victim lady identified accused No.1-Michael within hours of the incident. Thereafter, on 16.11.1987 at about 6.30 p.m. the victim lady Shobha expired in the hospital. After completion of investigation, charge-sheet came to be filed.

3. Charge came to be framed against the Respondent Nos.1 to 7 under Sections 366, 376 (2)(g) and 302 read with Section 34 of IPC. After going through the evidence adduced by the prosecution, the

learned Additional Sessions Judge acquitted all the respondents-accused of the offences levelled against them. Being aggrieved thereby, the State has filed this appeal against acquittal.

4. We have heard Mrs.Pai, the learned A.P.P. for the State and Mr.Kocheta, the learned advocate for the Respondent Nos.1 to 4, 6 and 7 i.e. original accused Nos.1 to 4, 6 and 7. We have also perused the record pertaining to the present case as well as judgment and order passed by the learned Sessions Judge. After carefully considering the matter, we are of the opinion that the learned Sessions Judge has rightly acquitted the Respondent Nos.2 to 4, 6 and 7.

5. As far as Respondent Nos.2 to 4, 6 and 7 are concerned, after perusing the record, we are of the opinion that there is no reliable material on the basis of which these accused persons could have been convicted. Deceased Shobha had made four dying declarations. The first in point of time was made before P.W.14 Police Constable Sasane who was present at the Khan Road Police Chowky when the deceased reached there. Thereafter, P.W.15 police head constable Sathe came to the police chowky. He

made enquiries with the victim lady. The victim lady narrated the same facts to him as told to Sasane. Thereafter, the victim lady was taken to Sasoon hospital where P.W.7 Dr.Adhav examined her. The victim lady gave same history to Dr.Adhav as to how she sustained burns which were noted in the case papers. Thereafter, P.W.9 Rajaram Ratawade Special Judicial Magistrate was called. The victim lady narrated all the facts to him. Thus, it is seen that there are four dying declarations on record. Some of the dying declarations are oral and some of them are written dying declarations. However, it is pertinent to note that in none of the dying declarations, the victim lady has mentioned names of any of these accused persons i.e. 2 to 4 and 6 and 7. Moreover, there is no recovery at the instance of any of these accused persons.

6. It was pointed out by the learned A.P.P. that as far as accused Nos. 2 to 4, 6 and 7 are concerned, their clothes were seized and sent to Chemical Analyser and semen stains were found on the clothes of accused nos.2 to 4, 6 and 7. She has further pointed out that on the clothes of accused Nos.3 to 6 semen stains of blood Group ‘B’

were found. On the clothes of accused No.7, human semen stains of ‘O’ Group were found and on clothes of accused no.2 human semen stains were found though, the blood group could not be determined.

. Mr.Kocheta on the other hand submitted that just from this fact, it cannot be conclusively stated that these accused persons had committed rape on the victim lady and had thereafter set her on fire. He has submitted that there is no recovery at the instance of any of the accused Nos.2 to 4, 6 and 7 or any other incriminating piece of evidence so as to connect them with the crime. After scanning the evidence, we find this submission is correct and hence, we are of the opinion that the view of the learned Sessions Judge acquitting Respondent Nos.2 to 3, 6 and 7 is a reasonable and possible view. Hence, we are not inclined to interfere with the acquittal of Respondent Nos.2 to 4, 6 and 7.

7. As far as Respondent No.1-Michael is concerned, his case stands on a different footing than that of other Respondents. Soon after the F.I.R. came to be lodged, Respondent No.1 came to be arrested by the police. Thereafter, he was taken on 15.11.87 at about 4.00 p.m. to Sasoon hospital where the

victim lady was under treatment. Accused no.1 was shown to the victim lady and she has identified accused no.1-respondent No.1 as the person who had threatened her at the point of knife and taken her on his scooter to a room in the race-course where she was gang-raped and thereafter she was set on fire. She has identified accused No.1 within hours of the incident. After the victim lady identified the accused No.1, her statement came to be recorded. Before recording statement, Doctor certified that she was conscious and was in a position to give her statement.

8. That accused no.1 was taken by police to Sasoon Hospital and there victim lady identified accused No.1 is brought on record through the evidence of P.W.18 P.I.Gajanan Patil. P.I. Patil has stated that Michael (Respondent No.1) was brought to the Police Station. After interrogating Michael, he took Michael to Sasoon Hospital at about 4 p.m. The victim lady was conscious at that time. A Doctor and Nurse were also present. The Doctor certified that victim was in a position to speak. Thereafter, the victim lady stated that Michael was the same person who had threatened her at the point of knife and taken her on his scooter to a room in

the race-course where she was gang-raped and thereafter, she was set on fire as she would tell the police. The evidence of this witness is corroborated by P.W.8 Dr.Satish Papadikar. Dr.Papadikar has stated that on 15.11.1987 at about 4.00 p.m. the police brought one person named Michael in police van in his presence. On seeing him, the victim made a statement before the police that said person at point of knife took her on scooter to one room in race course chawl and there said person and ten other persons raped her and burnt her. Dr.Papdikar has specifically stated that the victim lady made the statement in his presence. Dr.Papadikar has further stated that he has examined the victim lady and certified that she was in a position to give her statement and thereafter, he gave his endorsement (Exhibit-33) below that statement.

9. The fact that the victim lady identified accused No.1 when he was brought to the hospital, is also corroborated by the evidence of P.W.13 Jahira Shaikh who was a Nurse in Sasoon Hospital at that time. Jahira Shaikh stated that the victim lady Shobha was admitted in Sasoon hospital. On 15.11.1987, at about 4. p.m. some policeman came

to the burn ward along with one person by name Michael Tony. At that time, she and Dr.Papdikar were standing near the victim lady's bed. The police asked victim lady whether she knew the person brought by him. Lady identified that person as Michael Tony. Jahira Shaikh has further stated that victim lady said that Michael Tony took her on his scooter under threat to race-course chawl and there she was raped by accused no.1 and ten other persons and as they were afraid that she would tell the police, she was set on fire. Jahira Shaikh has stated that thereafter statement of victim was recorded in her presence and Dr.Papdikar gave endorsement that the patient was in a position to make a statement.

10. It is the case of the victim lady that she was taken to a room in race-course chawl between 14th and 15th November, 1987 where she was raped by many persons and thereafter set on fire. This case of the victim lady is borne out by the evidence of P.W.4 Sayyed Vazir who was the Watchman at the race-course. He has stated that his duty hours were from 00.00 hours on 14th November, 1987 to 8.00 a.m. on 15th November, 1987. He stated that at 00.05 hours, he suddenly saw a woman running,

shouting and crying for help. This occurred at about 00.05 hours on 15th November, 1987. P.W.14 Constable Sasane has stated that on 15.11.1987 at 00.15 hours, victim lady came to Khan Road Police Chowky, she was in burnt condition and she gave the history that she had been taken away at the point of knife to a room in race-course chawl and thereafter, she was raped and burnt. On message being received by P.W.15 Police Head Constable Sathe, he reached at Khan Road Police Chowky at about 00.30 hours. He made enquiries with the victim lady who gave the same story as stated to Police Constable Sasane. Thereafter, constable Sathe took the victim lady to Sasoon hospital. It has come in the evidence of Head Constable Sathe that he admitted the victim lady in Sasoon Hospital at about 1.15 a.m. on 15.11.1987. On being admitted to the hospital, P.W.7 Dr.Adhav examined the victim lady. She gave the same history to him as was given by her to police constable Sasane and police head constable Sathe. Dr.Adhav noted the history in the case papers. In the meantime, message was given to P.W.9 Special Judicial Magistrate Shri.Ratawade to reach to Sasoon Hospital. After getting it confirmed from the Doctor that patient was in a position to make a

statement, he recorded the dying declaration (Exhibit-35) of the victim lady. This dying declaration was recorded at about 2.30 a.m. Thus, all these witnesses bear out the prosecution case that the victim lady was taken at the point of weapon by one person on his scooter to race course chawl and there she came to be gang-raped and thereafter she was set on fire. The identity of the person who forcibly took her at the point of weapon on his scooter to race course chawl is fixed by the evidence of P.W.18 P.I.Gajanan Patil who recorded further statement of victim lady wherein she identified the accused No.1 to be the same person who took her on his scooter at the point of weapon to a room in race course chawl where he along with others raped her and thereafter she was set on fire.

11. Looking to the medical evidence on record, there is no doubt that the victim lady had sustained 92% burns. P.W.12 Dr. Uma Ramaswami who is a gynaecologist has clearly stated that there was evidence of sexual intercourse before burns. P.W.6 Dr.Laxmikant Bade performed the post mortem on the dead body of Shobha Rajput. He has stated that the cause of death was due to shock as a

result of burn injury. He has further stated that vaginal mucosa was congested. He has further stated that congestion of mucosa of vagina of the patient was possible due to multiple sexual inter-course. Thus, the case of the prosecution is also corroborated by the medical evidence.

12. That the incident took place in Room No.38 in the race course chawl, is also borne out by the evidence of P.W.10 S.S.Ugade. He has stated that he resided in room no.35 in race course chawl. The room adjoining to his room was room number 38. On 14.11.1987 he returned home at 9.00 p.m. Thereafter he heard sound of someone bolting the door of his room from outside. He gave a call, however, he did not receive any reply. After sometime, he heard the sound of breaking of the window glass of the next room. Thereafter, he also heard the sound of woman from that room. He has also heard sound of woman moaning and crying in the next room. Thereafter, he heard sound of woman running outside and shouting loudly. This witness has stated that this must have happened at about 12 mid-night. After sometime he heard the sound of someone pouring water in the adjoining room. This witness gave a call from his room. Thereafter, the

door of his room was opened. After this witness came out from his room, he got smell of burning from the room next door. The evidence on record shows that the glass window in the room where the incident took place was broken which corroborates the evidence of P.W.10 Ugade.

13. It is the prosecution case that accused No.1 showed a weapon to the victim lady and made her sit on his scooter and thereafter he took her to a room in race-course chawl. The fact that accused no.1 was on that day in possession of scooter, is brought out in the evidence of P.W.5 Pinto. P.W.5 C.G.Pinto has stated that on 14.11.1987 accused No.1 Michael came to his house at about 2.30 p.m. and requested him to lend him a Scooter. This witness has stated that he handed over the scooter to accused No.1 at about 2.30 p.m. Thereafter scooter was returned to him on 15.11.1987 at about 10.30 a.m. When this witness asked accused No.1 Michael about the delay in returning the scooter, accused No.1 replied that there was some problem with the scooter and hence, he returned the scooter on 15.11.1987 in the morning.

14. Besides the above evidence, there is one other

circumstance against Respondent No.1. The clothes of respondent No.1 Michael came to be seized under panchnama and his under pant and pant were found to have semen stains. It is to be noted that accused No.1 was arrested immediately after the incident. P.W.18 B.G.Patil has deposed about seizure of clothes of Respondent No.1. Nothing has ben elicited in the cross-examination of this witness so as to disbelieve him. The C.A. report shows that there were semen stains on the clothes. Respondent No.1 has preferred no explanation for the finding of semen stains of 'O' group on his clothes. Thus, though minor this is an additional circumstance against Respondent No.1.

15. Mr.Kocheta has submitted that trumpcard of the prosecution case is that respondent No.1 has been identified by the victim lady as the person who at the point of weapon, took her on his scooter to a room where she was gang-raped and lateron burnt. He has submitted that all the accused were unknown to the victim lady, which is seen from the fact that in the FIR she has not named any person. She has stated that one unknown person took her at the point of weapon on his scooter. He has submitted that respondent No.1 was not put in identification

parade and the victim lady has not identified respondent No.1 in an identification parade but she has identified him in the hospital when the police brought him to the hospital. He has submitted that such identification by the victim of the respondent No.1-accused no.1 cannot be relied upon. We do not see much merit in this contention. In our opinion, holding of test identification parade in respect of the accused persons specially respondent No.1 was not at all necessary in the facts and circumstances of this case. Identification parades are necessary where the victim had a chance to see accused persons only for a few seconds or a couple of minutes. In the present case, the victim lady was taken by respondent No.1 on his scooter at the point of knife to a room in race course chawl and there not only accused No.1 but ten persons committed rape on the lady. Obviously, this would require sometime. Thereafter, the accused persons had set the lady on fire. Thus, there was sufficient opportunity for the lady to observe respondent No.1. It was not a case of a fleeting glimpse of the accused but accused and the victim lady were together for a a few hours which is a considerable length of time. Thus there was ample opportunity for the victim girl to observe

Respondent No.1. In our opinion in such case, not holding of identification parade would not affect the identification of Respondent No.1 by the victim lady in the hospital nor would it vitiate the trial in any manner. Moreover, the statement of Shobha identifying Respondent No.1 can be looked into as it is in the nature of a dying declaration.

16. In the case of **Ronny @ Ronald Alwaris** reported in **A.I.R. 1998 SC 1251,** the Supreme Court has observed that where the witness had opportunity to interact with the accused for some period of time i.e. seven to eight minutes, in such circumstance holding of test identification parade was not necessary. In the said case it is further observed that the purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what the witness had seen earlier. As observed earlier, the victim lady was in the company of accused no.1 for a few hours. Moreover, within 24 hours of the incident she has identified accused no.1. Her statement identifying the accused which is in the nature of a dying declaration was immediately recorded. In our opinion the said statement can be safely relied upon.

17. So also in the case of **Dnyaneshwar S/o Tulsiram Khobragade Vs. State of Maharashtra, reported in 2003 ALL MR (Cri) 10**, the prosecutrix was raped by an unknown man. In the said case the prosecutrix had admitted during the cross-examination that she had not seen the accused prior to the incident and that she was not called for identification after the incident. In the said case learned Advocate for the appellant had urged that the prosecutrix did not know the appellant and in the absence of identification parade her evidence cannot be believed. In the said case, this Court held that,

> "This is not a case where the prosecutrix has momentarily seen the appellant or she had seen the appellant in insufficient light, but on the contrary, she was able to see the appellant for some time. In matters of violation of person of prosecutrix, the identity of the person who commits rape is permanently fixed in the mind of the prosecutrix and the prosecutrix has categorically stated that it was the appellant who had committed heinous crime on her

person."

. In the present case, the victim lady had sufficient opportunity to observe the respondent No.1 as the respondent No.1 and she were together for more than a few hours i.e. from about 7:00 p.m. to midnight. Moreover, the victim lady has identified the respondent No.1 within a few hours of the incident. In such case, even in the absence of identification parade, the statement of the victim lady, identifying the respondent No.1 as one of the culprits, can be safely relied upon.

18. Looking to the evidence on record, it is clear that the victim lady was taken forcibly by accused no.1-Michael on his scooter to a room in race course chawl at the point of knife. The evidence on record and the medical evidence is also sufficient to show that the victim was raped by accused No.1 and others and thereafter, she was set on fire by these accused persons and others due to which she died. In our view, all these circumstances taken together clearly point out the complicity of Respondent No.1-Michael. Thus, after carefully considering the matter, we are of the

opinion that there was enough material to connect accused No.1 with the offence, hence, the learned Sessions Judge erred in acquitting Respondent No.1.

19. Looking to the evidence on record, it is clear that Accused No.1 Michael had taken the victim lady forcibly on his scooter at the point of knife to a room in race-course chawl. The evidence of the witnesses and medical evidence on record is sufficient to show that the victim lady was raped by accused No.1 and others and thereafter, she was set on fire. Hence, Accused No. 1 deserves to be convicted and punished for the offence under Sections 366, 376(2)(g) and 302 of IPC.

20. On the point of sentence, we have heard the learned advocate appearing for the Respondent No.1-original accused No.1. He has submitted that lenient view may be taken and the minimum sentence may be imposed on the Respondent No.1.

21. In the result, the judgment and order of acquittal passed in respect of original accused Nos.2 to 4, 6 and 7, is confirmed. However, the judgment and order of acquittal in respect of the original accused No.1-Michael is set aside.

Original Accused No.1 is convicted for the offence under Sections 366, 376(2)(g) and 302 of IPC. For the offence under Section 366 of IPC, he is sentenced to R.I. for five years and to pay a fine of Rs.200/- in default R.I. for one month. For the offence under Section 376(2)(g) of IPC, he is sentenced to R.I. for ten years and to pay a fine of Rs.500/- in default, R.I. for three months. For the offence under Section 302 of IPC, he is sentenced to R.I.for life and to pay a fine of Rs.500/- in default R.I. for three months. All the sentences to run concurrently. The Respondent No.1-original accused No.1-Michael is on bail. He shall surrender to custody within six weeks from today.

22. Appeal is partly allowed.

[D.G.DESHPANDE, J.]

[SMT.V.K.TAHILRAMANI,J.]